



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NL Industries, Inc.

Plaintiff,

v.

The City of Chicago

Defendant.

No.

06CH15363

Judge:

**COMPLAINT FOR ENFORCEMENT OF CONSENT DECREE, INJUNCTION,
DECLARATORY JUDGMENT AND OTHER RELIEF**

Now comes Plaintiff, NL Industries, Inc. ("NL"), by its attorneys, and for its Complaint against Defendant The City of Chicago, states as follows:

Parties

1. NL is a New Jersey corporation with its principal place of business located at Three Lincoln Centre, 5430 LBJ Freeway, Suite 1700 in Dallas, Texas.
2. NL owned the property located at 12000 to 12054 South Peoria Street and 901 to 935 West 120th Street in Chicago, Illinois (the "Site") from in or about 1937 through 1976, at which time it sold the Site to ELT, Inc., which subsequently changed its name to Dutch Boy.
3. Defendant, the City of Chicago (the "City") is an Illinois municipal corporation with offices located at 121 North LaSalle Street, Chicago, Illinois.

Nature of this Action

4. By this action, NL is seeking a declaration that the City has failed to comply with its obligations set forth in a Consent Decree respecting the Dutch Boy Site entered June 30, 1999 by the Circuit Court of Cook County, Chancery Division, in The City of Chicago v. NL Industries, Inc. and Artra Group, Inc., No 91-CH-4534 (Exhibit A); and NL is seeking an order from the court enforcing that Consent Decree and enjoining and compelling the City to satisfy its

obligations thereunder including, without limitation, The City's obligations to operate and maintain the Site following completion of cleanup activities undertaken by NL and to obtain a No Further Remediation Letter for the Site from the Illinois Environmental Protection Agency. In addition, NL is seeking damages resulting from The City's breach of contract and the City's breach of its covenant of good faith and fair dealing; and NL is seeking recovery of its costs, including attorneys fees, incurred to enforce the Consent Decree.

Jurisdiction and Venue

5. Paragraph 13 of the Consent Order that NL is seeking to enforce (Exhibit A) expressly provides that this Court shall have jurisdiction and venue over any action for purposes of interpretation and enforcement of the terms of the Consent Decree.

Background to this Action

Site Ownership History

6. During NL's ownership of the Site, NL manufactured lead-based paint at the Site.

7. Dutch Boy continued manufacturing lead-based paint at the Site after acquiring the Site, but, upon information and belief, no lead-based paint production has occurred at the Site since 1980.

8. In or about 1980, Dutch Boy (which later changed its name to Artra Group, Inc. ("Artra")) conveyed the Site to Goodwill Industries of Chicago, by way of charitable donation.

9. Sometime after 1980, the City acquired the Site and has owned the Site since that time, though it has never conducted any manufacturing operations thereon.

Discovery of Contamination

10. After Artra had conveyed the Site to Goodwill, wrecking operations commenced to tear down the structures remaining on the Site.

11. During this demolition and excavation work, lead and asbestos were discovered at the Site.

The City's Complaint

12. Upon the discovery of lead and asbestos, on May 16, 1991, the City filed suit against NL and Artra, seeking to compel remediation of the Site.

13. The City's lawsuit, docketed in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, bearing the title The City of Chicago v. NL Industries, Inc. and Artra Group, Inc. and docket number 91-CH-4534, alleged that the contamination discovered at the Site was caused by lead-paint production that occurred there from 1906 through 1980.

14. The lawsuit further alleged that NL and Artra (and/or their predecessors-in-interest) were the parties that had caused that contamination and also sought to compel NL and Artra to remediate the contamination at the Site.

The EPA's Investigation

15. While the City's lawsuit was pending, the United State Environmental Protection Agency ("USEPA"), together with the Illinois Environmental Protection Agency ("IEPA") conducted their own environmental investigation and remediation activities at the Site.

16. In 1995, the USEPA notified all present and past owners of the Site, including NL and Artra, of their potential liability for the cost of past and future environmental investigation and remediation activities at the Site.

17. On March 26, 1999, the USEPA issued a Unilateral Administrative Order ("UAO") to NL directing it to perform investigatory and remedial activities at the Site. (A copy of the UAO is attached as Exhibit B).

USEPA Approval of the Work Plan

18. The UAO required NL to **prepare** and implement a work plan to address lead contamination in soils such that Site soils would "not pose a threat of actual or potential exposure to lead to nearby human populations, animals or the food chain or be allowed to migrate off-site." (See Exhibit B at § V(3)(d)).

19. As required under the UAO, NL prepared and the USEPA approved a Remedial Action Work Plan (the "Work Plan") for remediation of the Site and submitted it to the USEPA, also providing a copy to the City. (A copy of the Work Plan is attached at Exhibit C).

20. The Work Plan specified four elements of remedial action to be accomplished following preparation of the Site, including remediation of certain, specified areas of soil and placement of paved caps on certain, identified areas.

21. The Work Plan did not provide for removal or remediation of soil to less than 1,400 mg/kg of lead if that soil was to remain underneath a USEPA-approved remedial cap.

22. Certain specified portions of the Site that were unpaved were to be remediated by way of removal of contaminated soil and replacement with clean soil such that average lead concentrations did not exceed 1,400 mg/kg.

23. The Work Plan identified two paved areas (an 11,000 sq. ft. section in the southeast corner of the Site and a 5,400 sq. ft. section in the northwest corner of the Site) from which NL was to remove the pavement. After removing the pavement from these two specific areas, NL was to remediate the soil such that its lead concentration was no greater than 1,400 mg/kg.

24. Pursuant to the Work Plan, the paving in the two areas described in the preceding paragraph was to be removed by NL, the soil underneath was to be remediated and clean fill was to be added. These two areas were not to be repaved following the remedial work.

25. The Work Plan did not require NL to remove the concrete and asphalt in the middle portion of the Site or to remove or otherwise remediate any contaminated soil underneath. Rather, the Work Plan required that these portions of the Site be “capped” or “patched” with asphalt that was two to three inches thick.

26. The USEPA approved this Work Plan as removing any threat to the public health and welfare that the Site had previously posed.

The Settlement with the City

27. After reviewing the Work Plan, the City agreed to amicably resolve its claims against NL asserted in the lawsuit.

28. This resulted in the negotiation and execution of a Consent Decree between NL and the City to settle all claims related to the Site.

29. The Consent Decree was entered by, and became a judicial order of, the Honorable Sidney A. Jones III of the Circuit Court of Cook County, Illinois. (See Consent Decree, attached as Exhibit A).

30. The Consent Decree settling the City’s litigation against NL specifically adopted and incorporated the entirety of the USEPA-approved Work Plan as appropriate remediation for the Site.

31. As a result of the settlement, as reflected in the Consent Decree, NL agreed to perform additional work not set forth in the original Work Plan.

32. Specifically, the judicially-approved Consent Decree between the City and NL adopted the Work Plan approved by the USEPA, required NL to submit a supplemental work plan for approval by the City, required NL to excavate, treat and dispose of hazardous waste and soils with lead concentrations above 1,400 mg/kg under certain, specifically identified paved areas, and required NL to remove certain debris piles identified in the Work Plan

33. The judicially-approved Consent Decree also stated that NL was only responsible for soil remediation costs up to \$400,000, made the City responsible, upon completion of the remediation, to obtain a No Further Remediation Letter for the Site, and made the City responsible for the operation and maintenance of the Site following remediation.

34. The Consent Decree specifically “incorporated by reference and made [the Work Plan] a part of this Consent Decree as though fully set forth herein.” (See Exhibit A at page 2).

35. In other words, aside from a few specifically identified exceptions, the Consent Decree approved of the remediation set forth in the Work Plan, including the capped surfaces, as the appropriate remediation for the Site.

36. As required by the Consent Decree, NL prepared and submitted a Supplemental Work Plan (“SWP”), which the City approved. (A copy of the SWP is attached as Exhibit D).

37. The SWP identified five discrete areas on the Site (four of which were contiguous areas just north of center of the Site and one of which was towards the northwest corner of the Site) that were paved and from which NL and the City agreed to remove the paving.

38. NL and the City also agreed that NL would remediate the soil in these five areas without installing asphalt caps.

39. These were the only areas which, even though the original Work Plan called for caps, the SWP stated were not to be capped.

40. The SWP did not reference any other areas on the Site or require that NL had to remove any other remedial caps.

41. Instead, the City adopted the remaining capped surfaces as the appropriate remedial measure for the remainder of the Site.

42. The City never objected to the USEPA-approved remedial caps, except for the five discrete areas addressed in the Consent Decree.

NL Cleans the Site

43. NL completed the work required under the SWP in addition to the work required under the original Work Plan.

44. The work took place throughout the summer of 1999, and following completion of the work, NL submitted its Remedial Action Report ("RAR") to the USEPA on December 22, 1999.

45. After reviewing the work, including the capped surfaces, the USEPA sent a letter to NL approving the RAR and commending NL on "a job well done." (A copy of the USEPA's letter is attached as Exhibit E).

46. In other words, all of the work required under the UAO was complete, and the Site posed no threat to the public health or welfare.

47. The City never indicated that it was opposed to the remedial caps, or that it felt further work was necessary.

48. At this point, pursuant to section IX of the Consent Decree, it became the responsibility of the City to maintain the Site, including the remedial caps.

49. Moreover, by that point, NL had spent more than \$400,000 to perform the soil remediation required under the SWP.

50. Pursuant to the Consent Decree, the City released NL from any liability for remediation beyond the first \$400,000 spent.

The City's Subsequent Disturbance of the Cap and Contamination of the Site

51. Not long after the USEPA provided written approval of the completed remediation, the City entered the Site and began disturbing the remediated areas.

52. Significantly, before removing the remedial measures that the USEPA had approved and to which the City had agreed, the City did not consult with the USEPA or NL.

53. Through its unilateral removal of the remedial measures, the City unearthed contaminated soil and proceeded to spread contaminated soil around the Site to areas that previously had been remediated.

The City's Attempt to Use the USEPA to Circumvent the Consent Decree

54. The City's removal of the caps and spreading of contaminated soil from these areas to other portions of the Site created the environmental issues that currently exist on the Site.

55. After realizing that it had caused the contamination, the City notified the USEPA that it should test the Site for contaminated soil, without informing the USEPA of its actions.

56. The City never informed the USEPA that it had removed the USEPA-approved remedial caps, and had spread contaminated soil around the Site.

57. The City never informed the USEPA that, pursuant to the Consent Decree, NL had been released from any further obligation related to the Site.

58. The City never informed the USEPA that, pursuant to the Consent Decree, the City had assumed sole responsibility for maintaining the Site, including the USEPA-approved remedial caps.

NL's Attempt to Resolve the Issue Without Litigation

59. After receiving notice from the USEPA that there was contamination at the Site and after learning of the City's actions, NL notified the City that the City was responsible for the cleanup of the newly created environmental issues at the Site because: (1) the City had caused the contamination by tearing up the approved, remedial caps and by moving contaminated soil to other areas of the Site; (2) the City expressly assumed responsibility, pursuant to the parties' settlement, for the operation and maintenance of the Site; and (3) pursuant to the Consent Decree,

the City released NL from any liability that NL might have had to perform remediation at the Site in excess of \$400,000, which NL has already spent.

60. A true and correct copy of NL's September 9, 2002 notice of the foregoing disputes to The City is attached hereto as Exhibit F. These disputes were not resolved within fourteen (14) days or at any time thereafter.

61. The USEPA has contacted NL and asserted that NL is a responsible party and is obligated to address the environmental issues at the Site caused by the City's activities.

62. As a result of the City's acts and omissions, the USEPA has threatened to sue NL to force NL to address the contamination caused by the City...

63. The City, through its actions and omissions, has caused NL to incur significant expense to protect its rights under the Consent Decree, and additional expense is anticipated.

64. The City has refused to abide by the terms of the Consent Decree by acknowledging its responsibility for remedying the environmental contamination caused by its actions.

COUNT I

(Enforcement of Consent Decree)

65. Plaintiff repeats and realleges each and every allegation in the preceding paragraphs as if set forth at length herein.

66. Pursuant to 735 ILCS 5/2-701(a):

The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any ... contract or other written instrument, and a declaration of the rights of the parties interested.

67. As set forth in more detail above, the City and NL entered into a judicially-approved, binding, contractual agreement in the form of the Consent Decree, and this Consent Decree expressly provides that either party may seek judicial enforcement of the Consent Decree by this Court. (Exhibit A, pars. 11-12)

68. The Consent Decree further provides that if any party seeking such judicial enforcement is determined by the Court to be the prevailing party, the non-prevailing party shall pay the prevailing party reasonable costs, including attorneys' fees, incurred in pursuing such action.

69. NL has complied with all of its obligations under the terms of the Consent Decree, including remediating the prior contamination at the Site consistent with the USEPA-approved Work Plan and the SWP.

70. The City has failed and refused to comply with its obligations under the terms of the Consent Decree, including, without limitation, the following:

- a. Failing to maintain the Site, including the USEPA-approved remedial caps;
- b. Refusing to assume responsibility for remediation in the five discrete areas once the cost of remediating those areas exceeded \$400,000; and
- c. In contravention of the terms of the Consent Decree, the City has requested the USEPA to direct NL to perform additional work at the Site to address the environmental issues created by the City's removal of the remedial caps

71. In addition, The City has further failed and refused to comply with its express obligation under the Consent Decree to obtain a No Further Remediation Letter for the Dutch Boy Site from the Illinois Environmental Protection Agency. (Exhibit A, Article VIII.)

WHEREFORE, NL seeks the following relief:

- a. An order declaring that it has completed all of its obligation under the terms of the Consent Decree;
- b. An order declaring that the City is responsible for operating and maintaining the Site, including the remedial caps and enjoining and compelling The City to satisfy its operation and maintenance obligations under the Consent Decree;
- c. An order declaring that the City is responsible for any further remediation at the Site;
- d. An order declaring that the City is required to obtain a No Further Remediation Letter for the Site from the Illinois Environmental Protection Agency, and enjoining and compelling The City to promptly take all steps necessary and to do all work required to obtain that No Further Remediation Letter.
- e. An order declaring that the City is to indemnify NL for any and all costs incurred or to be incurred by NL associated with the USEPA's request that NL perform additional investigation or remediation at the Site;
- f. Attorneys' fees and costs associated with bringing this action; and
- g. Such other relief as the Court deems appropriate.

COUNT II

(Breach of Contract)

- 72. Plaintiff repeats and realleges each and every allegation in the preceding paragraphs as if set forth at length herein.
- 73. The Consent Decree is a valid, binding, enforceable contract.
- 74. Both parties assented to all of the terms of the Consent Decree.

75. NL has fulfilled all of its duties and obligations under the terms of the Consent Decree including:

- a. Performing all of the remedial work required by the USEPA-approved Work Plan; and
- b. Performing all of the remedial work required by the City-approved SWP which was in addition to the USEPA-approved Work Plan.

76. The City has breached the contract by failing to perform its obligations including:

- a. Failing to maintain the Site, including the USEPA-approved remedial caps;
- b. Refusing to assume responsibility for remediation in the five discrete areas once the cost of remediating those areas exceeded \$400,000; and
- c. In contravention of the terms of the Consent Decree, requesting the USEPA to direct NL to perform additional work at the Site to address the environmental issues created by the City's removal of the remedial caps.

77. By virtue of this aforementioned conduct, the City has breached the terms of the Consent Decree.

78. As a result of this breach, NL has incurred and continues to incur significant expense.

WHEREFORE, NL seeks the following relief:

- a. Indemnification and/or contribution from the City for any and all costs incurred or to be incurred by NL associated with the USEPA's request that NL perform additional investigation or remediation at the Site;
- b. Attorneys' fees and costs associated with bringing this action; and
- c. Such other relief as this Court deems appropriate.

COUNT III

(Breach of Covenant of good Faith and Fair Dealing)

79. Plaintiff repeats and realleges each and every allegations in the preceding paragraphs as if set forth at length herein.

80. Implied in every contract in Illinois is a covenant of good faith and fair dealing.

81. Under this covenant, each party agrees to avoid any action or omission that would injure the rights of any other party to enjoy the fruits of the contract.

82. NL and the City entered into a binding contract, in the form of a judicially-approved Consent Decree.

83. NL had the right to enjoy the fruits of the contract, including being free from further liability once it completed the cleanup as required by the USEPA-approved Work Plan and the City-approved SWP.

84. NL completed the work required under the Work Plan and the City-approved SWP to eliminate any potential risk posed by the Site to the public health or the environment and has fulfilled all of its obligations under the terms of the Consent Decree.

85. The City has, by virtue of removing the USEPA-approved remedial caps and subsequently misinforming the USEPA that NL was responsible for the current environmental issues which, in fact, the City caused through its unilateral actions, has caused the USEPA to request NL to incur additional expense to address the environmental issues caused by the City.

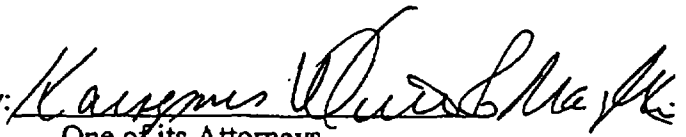
86. The City, through its acts and omissions has also caused NL to incur substantial expense to respond to the USEPA's request tat NL perform additional environmental investigation and remediation at the Site to address issues caused by the City's actions.

87. By virtue of the foregoing actions, the City has breached its duty of good faith and fair dealing to NL.

WHEREFORE, NL seeks the following relief:

- a. Indemnification and/or contribution from the City for any and all costs incurred or to be incurred by NL associated with the USEPA's request that NL perform additional investigation or remediation at the Site;
- b. Attorneys' fees and costs associated with bringing this action; and
- c. Such other relief as this Court deems appropriate.

NL Industries, Inc.
Plaintiff

By: 
One of its Attorneys

Dated: August 1, 2006

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